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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ALAN F. GERSMAN, *et al.*,
Petitioners,

v.

GROUP HEALTH ASSOCIATION, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 42 U.S.C. § 1981 interdicts racially discriminatory conduct that can equally be characterized as termination of a contract, refusal to renew a contract, or failure to enter into a contractual relationship.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia on petitioner's request for rehearing and suggestion for rehearing *en banc* is attached as App. 38a-40a. Its original opinion, reported at 931 F.2d 1565, is attached as App. 1a-26a. The decision of the district court, reported at 725 F.Supp. 573, is attached as App. 27a-37a.

JURISDICTION

This case arises on petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. The court below affirmed the district

court's ruling dismissing petitioners' complaint of discrimination under 42 U.S.C. § 1981 and the District of Columbia Human Rights Act, D.C. Code §§ 1-2501 *et seq.* Petitioners' timely request for rehearing was denied on July 5, 1991. By order dated September 27, 1991, Chief Justice Rehnquist enlarged the time within which petitioners could file this petition to November 2, 1991. Accordingly this petition is submitted within the time allowed by law. Petitioners invoke the jurisdiction of the Court pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1977 of the Revised Statutes (42 U.S.C. § 1981) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.

STATEMENT

Petitioners are Computer Security International, Incorporated (CSI) a Washington, D.C. Corporation engaged in the provision of off-site data storage for information intensive businesses in the Washington Metropolitan area, and its president and principal shareholder, Alan Gersman. In 1983, CSI entered into a service agreement with respondent Group Health Association (GHA) for one year. According to the terms of the contract, the agreement was thereafter renewed on a monthly basis until one party terminated the relationship. CSI and Mr. Gersman had enjoyed a longstanding and mutually satisfactory commercial relationship with GHA throughout the course of their dealings. This relationship was jarred to a halt when Adel Nakla, at the direction of Mohammed Ghafori (the recently hired manager of GHA's Management Information Systems division) asked Mr. Gersman a simple question:

> Are you a Jew?

Mr. Gersman is Jewish, and he so informed Mr. Nakla. This response marked the ruination of CSI's relationship with GHA and foreshadowed the futility of its effort to commence a new one.[1]

Immediately after this encounter, Mr. Gersman heard for the first time rumors that GHA was dissatisfied with CSI's services. GHA had solicited bids from other vendors for a recompetition of the service agreement in the Summer of 1987. In an effort to preserve his business with GHA, Mr. Gersman submitted an attractive bid (lower than the then-existing price) in September 1987 for renewal of the service agreement in October. That bid was rejected and the agreement was awarded to another vendor, one that was not owned and operated by "a Jew." GHA's refusal to do business with CSI was motivated solely out of Mohammed Ghafori's bigotry towards Jews.

Having no recourse under any other statutes, both CSI and Mr. Gersman brought suit against GHA under 42 U.S.C. § 1981 and the District of Columbia Human Rights Act ("DCHRA"), D.C. Code §§ 1-2501 *et seq.* They sought damages for the economic and personal injuries suffered as a result of GHA's naked antisemitism. The United States District Court for the District of Columbia dismissed both of their claims, finding that (1) neither Mr. Gersman nor CSI had standing to sue; (2) CSI and Mr. Gersman had failed to state a claim under § 1981; and (3) CSI and Mr. Gersman failed to state a claim under the DCHRA.

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[1] This case arises on appeal from the granting of GHA's Motion to Dismiss; therefore, petitioners' factual allegations must be accepted as true, and petitioners are entitled to all reasonable inferences from those allegations. *Conley* v. *Gibson*, 355 U.S. 41, 45 (1957). Moreover, GHA has conceded these facts in its Answer to the Complaint.

The Court of Appeals for District of Columbia Circuit affirmed in part and reversed in part. It ruled that the district court had erred in finding that CSI had no standing to sue, but agreed that Mr. Gersman did not have standing. A divided Court of Appeals also affirmed the ruling that CSI had failed to state a claim under § 1981. The majority ruled that *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), foreclosed CSI's claim; considering the claim to be premised solely in the "termination" of the service agreement, it was no longer actionable under § 1981. In dissent, Judge Wald concluded that the Court's reasoning was formalistic, and that GHA's actions could fairly be labeled as either a refusal to make, a refusal to renew, or a termination of, the service agreement at issue. She concluded that the right to challenge racial discrimination should not hinge upon purely semantic distinctions, and that under *Patterson*, racially motivated terminations of contract remain actionable. Finally, after refusing to certify to the District of Columbia Court of Appeals the novel question of whether the DCHRA allowed suits based on racial discrimination in commercial contracting, the court affirmed the ruling dismissing petitioners' DCHRA claim. After denial of the petition for rehearing, this petition timely followed.

REASONS FOR GRANTING THE PETITION

This case presents issues of substantial public importance concerning the existence of one of this Nation's oldest and most fundamental civil rights statutes. Based upon a misapplication of this Court's ruling in *Patterson* v. *McLean Credit Union*, the Court below effectively declared that there is no law that prohibits raw ethnic or racial discrimination in commercial relations. The rulings below are representative of problems that the lower courts in general have had applying *Patterson*, which is forged in the employment relationship, to commercial and service agreements that are fundamentally distinct from at-will employment contracts. These decisions are ominous, as Title VII of the Civil Rights Act of 1964 offers no corresponding protection from invidious prejudice in commercial or service contracts. The lower courts' struggle to fit *Patterson* into the world of business relationships has rendered absurd, "analytically unsatisfying, and morally troubling" results. App. 26a. Review by this Court is necessary to provide guidance to the lower courts and to restore the protections of § 1981 to commercial and service agreements.

1. The narrow interpretation of § 1981 adopted by this Court in *Patterson* should not be extended to contracts outside of the employment relationship. In *Patterson* v. *McLean Credit Union*, this Court narrowed the reach of § 1981 claims, and held that suits seeking relief from racial harassment in the workplace would no longer be actionable. The Court reasoned that racial harassment claims do not involve the right to "make" contracts but rather implicate "the performance of established contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII." *Patterson*, 491 U.S. at 177.

But the reasoning behind the decision to curtail the reach of § 1981 in *Patterson* was anchored squarely on

the broad protections of Title VII for employment contracts. Justice Kennedy recognized that racial harassment, and other employment related claims following the formation of the contract, are already protected by the "expansive reach of Title VII." *Id.* at 180. The existence of Title VII's broad safeguards, the *Patterson* Court reasoned, supported a narrow interpretation of § 1981 "without sacrificing any significant coverage of the civil rights laws." *Id.* The Court not only concluded that significant overlap between § 1981 and Title VII allowed for a limited interpretation of the former statute, but cautioned that an expansive application of § 1981 in the workplace might effectively supplant the framework for conference and conciliation that Congress created under Title VII:

> Where conduct is covered by both § 1981 and Title VII, the detailed procedures of Title VII are rendered a dead letter, as plaintiff is free to pursue a claim by bringing suit under § 1981 without resort to those statutory prerequisites.

Id., at 181. The Court recognized that employees would naturally choose to pursue § 1981 claims over Title VII's remedial scheme, as § 1981 allowed for jury trials, compensatory and punitive damages, and provided employees with lengthier statutes of limitations. 491 U.S. at 182, n. 4.

But there is nothing in the *Patterson* decision that suggests that the Court meant to apply a restrictive interpretation of § 1981 outside of the employment context. To the contrary, Justice Kennedy's analysis reflects that the limitations were firmly affixed to the existence of Title VII: "We should be reluctant, however, to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute." *Id.* at 181.

A more natural reading of § 1981 to commercial and service agreements, where neither Title VII nor any other

statute offers relief, is faithful to this Court's reasoning in *Patterson*. The judiciary is often called upon to "interpret a statutory text in the light of surrounding texts that happen to have been subsequently enacted." *United States* v. *Fausto*, 484 U.S. 439, 453 (1988). As Justice Scalia stated:

> This classic judicial task of reconciling many laws enacted over time, and getting them to "make sense" in combination, necessarily assumes that the implications of a statute may be altered by the implication of a later statute.

Id.

While a Congressional intent to limit the scope of § 1981 may be discernible in light of the comprehensive remedial provisions of Title VII, certainly there can be no suggestion that Congress intended to repeal § 1981 by enacting Title VII. CSI's relationship to GHA was commercial, not employment, and Title VII's remedial scheme is inapposite to the claim at issue here. The *Patterson* Court's concern about eviscerating Title VII's detailed framework is not implicated in commercial transactions that fall outside the ambit of Title VII. Nevertheless, the courts below uncritically applied the limitations of *Patterson* to the service agreement at issue here, rendering an alarming result: notwithstanding Congress' intent to protect Jewish people as a class within § 1981, *Al Khazraji* v. *Saint Francis College*, 481 U.S. 604 (1987), CSI and Mr. Gersman have been left without any recourse to challenge GHA's overt antisemitism.

The court below is not alone in this overbroad and aberrant reading of *Patterson*. Review by this Court is necessary to reconcile the lower courts' holdings with *Patterson's* rationale of limiting § 1981's scope only in cases in which an alternative remedy is available under Title VII.

2. The lower courts have failed to distinguish between § 1981 claims also covered by Title VII and those stand-

ing alone; so too have they failed to recognize that *Patterson*'s dichotomy between pre- and post-formation conduct is best suited to the employment-at-will setting. Misapplication of the *Patterson* holding outside the context of employment-at-will has rendered particularly bizarre and nonsensical results. The lower courts' talismanic focus on "contract formation" has skewed § 1981 and rendered it a largely insignificant protection against racial prejudice in commercial settings.

In the context of employment-at-will, the legal relationship between the employer and applicant/employee changes at a definite moment: when the applicant is hired. In this context, a bright line delineates pre-formation and post-formation conduct. In the commercial and service context, however, this distinction dissolves. Such agreements are routinely renewed, remade and significantly modified. Accordingly, the "bright line" test for the formation of the relationship, which is easily applied in the typical at-will employment agreement, becomes blurred when applied to commercial and service relationships.

The futility of focusing on the "bright line" of contract formation is perhaps best illustrated by the facts in this case. The service agreement between GHA and CSI initially lasted for a term of one year. Thereafter, it automatically renewed on a monthly basis. Either party could, however, invoke a contractual mechanism for renegotiating an essential term of the contract—price. In the Summer of 1987, GHA initiated a recompetition of the agreement, seeking bids from outside vendors. It was during this time that GHA made the racist inquiry to Mr. Gersman. CSI, fearful of losing its business to the antisemitism looming at GHA, offered an even lower price than had previously been charged. Nevertheless, GHA terminated the September 1987 agreement, refused CSI's offer for an October 1987 agreement, and awarded its future business to another vendor.

The courts below held that GHA's conduct can only be characterized as a contract "termination." As Judge Wald concluded in dissent, however, the facts as stated include a refusal to make, a refusal to renew, and a termination of a contractual relationship, and might fairly be characterized as any one.

The infirmity of the majority's holding is patent. By its reasoning, had there been two "Jewish" firms who were discriminatorily denied GHA's contract, one with a past contractual relationship and one without, only the contractor with no prior relationship could state a claim under § 1981. Yet the discriminatory conduct in either case would be identical, and the damage inflicted the same. In otherwise identical situations, therefore, coverage under § 1981 would hinge on the happenstance of whether a prior relationship existed between the parties. That Congress would have intended such a distinction seems unlikely; certainly the plain language of § 1981 does not admit of this distinction.

Bewildering decisions have emerged from the application of *Patterson*'s narrow holding to the world of routine business relationships. In *Perry* v. *Command Performance*, 913 F.2d 99 (3rd Cir. 1990), which applied *Patterson* to an every day service relationship, the court labored to discern, and ultimately remanded for a determination of when the contractual relationship between the parties was formed. In that case, a hair stylist refused to serve Mrs. Perry, stating "I'm not going to do your hair. I'm from New Hampsrire, and I don't deal with blacks." *Perry*, 913 F.2d at 100.

While these facts would seem to present a paradigm § 1981 claim, the court was troubled by the fact that Mrs. Perry's appearance at the salon was pursuant to an appointment her husband had made the previous day. Interpreting *Patterson*, the court reasoned that if the contract was created when Mrs. Perry's husband called to make an appointment, then the refusal the next day was

"post formation conduct" and as such, no longer actionable under § 1981. If, on the other hand, the contract was yet to be formed when Mrs. Perry arrived at the salon, then the bigoted refusal to service Mrs. Perry infected the formation of the agreement, and Mrs. Perry could state a claim:

> [T]he record is inadequate to determine if the refusal to serve plaintiff occurred after the contract was made or was concurrent with the making of the contract. Arguably, an appointment for hair salon services is merely an invitation to negotiate and that acceptance of the offer occurs simultaneously to the performance of the contract. If that were the fact, then there would be no obligation to pay until, at least, the hairdresser began to render services. Ms. Abbott's refusal to wash and set Ms. Perry's hair could be viewed as a declination to enter into a contract for services with Ms. Perry.

Perry, 913 F.2d at 102. It is hard to imagine that Congress intended § 1981's coverage to turn on the minutia that obsessed the *Perry* court.

Even in the employment-at-will context, the single minded focus upon the formation of the contract has rendered absurd results. In *Baker* v. *Elmwood Distributing Inc.*, 940 F.2d 1013 (7th Cir. 1991), for instance, no bright line marked the formation of the employment relationship. The appellants, white truck drivers, were employees of Elmwood's predecessor. Shortly after the business was purchased, all the drivers were told to submit applications for employment with Elmwood. The drivers submitted their applications, and continued to work for two days. However, on the third day, the drivers were told that they would be let go because the company had been pressured to hire more black drivers.

The drivers sued under § 1981, claiming that Elmwood had refused to hire them because of their race. The district court granted Elmwood summary judgment, and

the Seventh Circuit affirmed. Notwithstanding Elmwood's admission that the drivers had never been hired, the court scrutinized "objective" indicia of contract formation to determine that Elmwood had hired, then fired the drivers two working days later. Interpreting *Patterson*, it ruled that § 1981 did not prohibit such post-formation conduct.

Statutes must be interpreted to avoid untenable distinctions and unreasonable results whenever possible. *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 71 (1982). This Court should not ascribe to Congress the intent to "draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation." *Indian Towing Co.* v. *United States*, 350 U.S. 61, 70 (1955). Yet the courts in *Perry* and *Baker*, and the courts below in the instant case, have hinged § 1981 claims upon arcane distinctions that produce unreasonable and incoherent results.

The lower courts have been unable to define a cogent standard for applying § 1981 to business relationships. Thus, rather than attempting to reify the moment of contract formation, a court should examine whether, whatever the past relationship of the parties might have been, a new and distinct relationship has arisen.

This question is answered simply: under otherwise identical circumstances, could a stranger to the relationship state a claim? If the prior contractual relationship could fairly be deemed inconsequential to the stated claim, then § 1981 should apply. That is, if evidence of the pre-existing relationship is unnecessary to articulate a claim, then a "new and distinct" relationship within the meaning of *Patterson* has been established.[2]

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[2] This standard resembles the broader interpretation of *Patterson* that courts have considered in promotion cases under *Patterson*'s guiding principles. In determining whether a promotion would rise to the level of a "new and distinct" relationship, some courts have focused upon whether a third party was considered for the promotion, as opposed to promotions that are the sort of routine advance-

This standard remains faithful to the principles guiding the *Patterson* decision. Racial harassment during the contract would remain unactionable because the existence of a contractual relationship is essential to the stated claim. But where a third party would undeniably have a viable claim under § 1981, it is anomalous to deny the same right to a party under identical circumstances, simply because it has pending, or has just ended, a relationship with the discriminator.

Applying this standard leads to sensible and easily defined results. Taking the facts as presented in the *Perry* case, Mrs. Perry would have been able to state a claim because any prior relationship between the parties was inconsequential to Command Performance's discriminatory refusal to cut her hair. Mrs. Perry would have the same right of action as a customer who walked in off the street without an appointment. The fortuity that her husband happened to call ahead for an appointment would not control. Similarly, under the facts of *Baker*, the drivers would have stated a claim under § 1981, just as would any third party applicant who was denied the position because Elmwood sought only black drivers. And finally, under the facts in the instant case, CSI would have the same right of action as any of the other firms involved in the competition of the October 1987 agreement. If such firms had been rejected during

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ment that only existing employees qualify for. As Judge Posner noted in *Malhotra* v. *Cotter & Co.*, 885 F.2d 1305, 1311 (7th Cir. 1989), this broader right of action "emphasizes the anomaly created by a rule that a stranger to the firm could sue under Section 1981 if his application for a position was turned down on racial grounds but a person already employed by the firm could not sue even though his application for the identical position was turned down on the identical grounds." *Id.* Judge Posner's broader interpretation of *Patterson* (commonly referred to as "the outsider test") has gained increased recognition in the lower courts. *See Rountree* v. *Fairfax County School Board*, 933 F.2d 219, 223 (4th Cir. 1991); *Mozee* v. *American Commercial Marine Service Co.*, 940 F.2d 1036, 1054 (7th Cir. 1991).

the competition because of Mr. Ghafori's animus towards Jews, they plainly could sue under § 1981. CSI should not be held to a different standard.

This proposed interpretation of § 1981 is harmonious with *Patterson's* holding that racial harassment is not protected by the right to make and enforce contracts. It also comports with the vast majority of the courts that have concluded that claims challenging racially motivated discharges from at-will employment relationships are also not actionable. In such employment settings, *Patterson's* pre-formation/post-formation analysis is easily applied. The same cannot be said about commercial and service relationships where the contract formation analysis is routinely a semantic exercise, or in employment situations where a distinct relationship arises between the parties.

3. The rigid and overly formalistic application of *Patterson* has vitiated § 1981 and rendered it near meaningless. This Court never intended *Patterson* to so severely limit § 1981's scope. Repeatedly and expressly it has reserved the question of whether § 1981 reaches discriminatory contract terminations. This petition presents the ideal factual setting within which to resolve the lingering issues of § 1981's breadth and to reaffirm that § 1981 does prohibit racially biased contract terminations.

Patterson itself reaches only racial harassment and promotion claims in the workplace; it makes no mention of terminations. Since *Patterson*, the Court has twice heard cases involving discharge claims under § 1981. In both cases, the Court commented that § 1981's applicability to discharge claims remains an open question. *See Jett* v. *Dallas Independent School District*, 491 U.S. 701, 711 (1989) ("assum[ing] for the purposes of these cases, without deciding, that petitioner's rights under § 1981 have been violated by his removal and reassignment."); *Lytle* v. *Household Manufacturing Inc.*, 494 U.S. 545 (1990) (O'Connor, J., concurring) (noting that "the

question whether petitioner has stated a valid claim under Section 1981 remains open.")

The lower courts have now uniformly extended *Patterson* to preclude claims for discriminatory discharge under § 1981.[3] Thus, the statute has been interpreted as forbidding race conscious refusals to enter into a contract, but allowing terminations of the same agreement because of pure racism. This is a result that defies reason and turns on its head § 1981's guarantee of the right to make contracts free from racial discrimination. By this counterintuitive reading of the statute, a court could hold that an avowed racist who entered into a contract on day one, but expressly terminated it because of racial prejudice on day two, is immune from suit under § 1981. Judge Wald echoed this concern in her dissent:

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[3] That is not to say that judges have universally agreed about this issue in the lower courts. Indeed, a panel of the Eighth Circuit initially held that § 1981 protected against racially biased contract terminations. The court found that implicit in § 1981's guarantee of the right to make contracts is the right to be free from discriminatory contract terminations, as termination involves the complete unmaking of a contract. *See Hicks* v. *Brown Group*, 902 F.2d 630 (8th Cir. 1990), *cert. granted*, and *judgment vacated*, 111 S.Ct. 1299 (1991), *rev'd*, —— F.2d ——, 1991 WL 204330 (8th Cir. Oct. 9, 1991). The panel's holding, however, was reversed by an *en banc* opinion of the Eighth Circuit in *Taggart* v. *Jefferson County Child Support Enforcement Unit*, 935 F.2d 947, 948 (8th Cir. 1991). Several of the circuit court decisions on this issue have been rendered by a divided panel, with strong dissenting opinions. *See, e.g., Prather* v. *Dayton Power & Light Co.*, 918 F.2d 1255 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 2889 (1991); *McKnight* v. *General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 1306 (1991); *Taggart, supra*. Finally, many of the district courts had rejected the argument that *Patterson* foreclosed discriminatory discharge claims, but these decisions were effectively overruled by subsequent decisions of their circuit courts. *See, e.g., Birdwhistle* v. *Kansas Power & Light Co.*, 723 F.Supp. 570, 575 (D. Kan. 1989); *Padilla* v. *United Airlines*, 716 F.Supp. 485, 490 (D. Col. 1989); *Booth* v. *Terminix International, Inc.*, 722 F.Supp. 675, 676 (D. Kan. 1989); *Carroll* v. *Elliot Personnel Services, Inc.*, 51 F.E.P. Cases (BNA) 1173 (D. Md. 1989).

> As a practical matter, if § 1981 prohibits an employer from refusing to hire an applicant because of her race, yet allows the employer to fire that person the next day because of her race, then the law's promise of the "same right [] to make [] contracts" is empty. Section 1981 cannot meaningfully be interpreted to distinguish between the employer who says to an applicant face to face, "I would hire you, but for your race," and the employer who hires a person sight unseen and then, upon meeting him, promptly fires him because of his race.

App. at 25a.

This is no longer just a frightening possibility. As we have seen, the Seventh Circuit confronted this very factual scenario and held that § 1981 offered no relief. In *Baker*, the court concluded that even if the drivers were hired, then fired three working days later because of their race, § 1981 offered no relief. *Baker*, 940 F.2d at 1018.

The *Baker* decision exemplifies the perils that are inherent in the unprincipled extension of the *Patterson* decision. This Court has long held that statutes should be interpreted to effectuate the remedial purposes for which they were enacted, *Federal Trade Comimssion* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968), and courts should avoid reading a statute in a manner that produces absurd results. *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543 (1940). Nonetheless, the lower courts have effectively held that through § 1981, Congress meant to stamp out invidious discrimination only during select days when the contractual relationship is formed, and would look with disinterest upon any racially motivated termination of that same agreement once consumated. That conclusion is both infirm and unnerving.

In its stead, this Court should adopt an interpretation of § 1981 more faithful to its broad remedial purposes. Judge Wald offered a sound alternative to the majority's

simplistic bright line test. Section 1981's promise of the same right to make contracts would prohibit persons from "refusing to stand in a contractual relationship with another party solely because of that party's race." App. at 25a. Therefore, whether by a refusal to enter into an agreement, or by the termination of the same agreement, if a party will not stand in a contract with another because of his or her race, § 1981 would apply. Otherwise, the right to make contracts free from discrimination is meaningless.

This Court has cautioned that "[n]either our words nor our decisions should be interpreted as signaling one inch of retreat from Congress' policy to forbid discrimination in the private as well as the public sphere." *Patterson*, 491 U.S. 188. The lower courts have not heeded this admonishment. By their unrestrained extension of Patterson's limitations to business and service relationships, the lower courts have not only retreated, but have in effect abandoned Congress' policy. There is now no law that will effectively deter the spread of malignant racial prejudice in business relationships. Review by this Court is necessary to correct the lower courts' misapplication of the *Patterson* ruling and restore meaning to § 1981.

4. The court below also erred in two other respects that warrant this Court's attention. First, the court refused to certify to the District of Columbia Court of Appeals the question of whether petitioner stated a claim under the DCHRA. The District of Columbia provided a statutory mechanism for certification of novel issues of local law that arise in the federal courts. D.C. Code § 11-723. This Court has strongly urged the courts of appeals to utilize such certification statutes. *Lehman Brothers* v. *Schein*, 416 U.S. 386, 391 (1974) (recognizing that certification "in the long run save[s] time, energy and resources and helps build a cooperative judicial federalism.") In its disturbingly brief treatment of

petitioners' DCHRA claim, the court below cited only two cases, yet these cases do not even tangentially deal with the question presented. See App. 17a. Rather than hazard a guess at the D.C. Council's intent, the court below should have certified the issue to the District of Columbia Court of Appeals. Its failure to do so is not only an abuse of discretion, but moreover it offends fundamental notions of federalism incorporated into the D.C. Home Rule Act. This Court should exercise its supervisory authority to direct, on remand, that the court of appeals certify this novel question of local law to the D.C. Court of Appeals.

Second, the court below erred in concluding that Mr. Gersman had no standing to sue under either § 1981 or the DCHRA. This holding was premised upon the flawed notion that Mr. Gersman suffered no injury from GHA's overt antisemitism. In fact, it was Mr. Gersman and not CSI that was the target of GHA's racism. Both § 1981 and the DCHRA provide for compensation for personal injuries. The court of appeals' determination that Mr. Gersman suffered no *economic* injury because he was not a party to the contract is thus inapposite. Mr. Gersman personally suffered "actual injury from the putative illegal action . . ." *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) and has standing to redress those injuries. Review by this Court is necessary to assure that the legal fiction of corporate status cannot be used as a shield by those who violate § 1981 to deny compensation to the true victims of their discrimination.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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November 1, 1991

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 7, 1991 Decided May 7, 1991

No. 89-5482

ALAN F. GERSMAN, *et al.*,
Appellants

v.

GROUP HEALTH ASSOCIATION, INC.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 88-01820)

David H. Shapiro, with whom *Richard A. Salzman* was on the brief, for appellants.

Anita Barondes, with whom *Christopher A. Weals* was on the brief, for appellees.

Before WALD, BUCKLEY and SENTELLE, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SENTELLE.

Dissenting opinion filed by *Circuit Judge* WALD.

SENTELLE, *Circuit Judge*: Appellants Alan F. Gersman and Computer Security International ("CSI") appeal the district court's decision dismissing their claims against

Group Health Association, Inc. ("GHA") for lack of standing and for a failure to state a claim under both § 1981 of the Civil Rights Act and the District of Columbia Human Rights Act ("DCHRA"), D.C. Code § 1-2501 *et seq.* We find that appellant CSI had standing to bring the present claims, but agree with the district court's conclusion that appellant fails to state a claim under either statute. We therefore affirm the district court's dismissal of this case.

I. Background

Appellant corporation CSI is engaged in the business of providing commercial storage of computer software, as well as other software services. From 1983 until 1987, CSI maintained a contractual relationship with health maintenance organization GHA for storage and delivery of GHA's computer software. The original contract specified a one-year term, subject to renewal and modification. The terms of the original contract state:

> The initial term of this agreement shall be for 1 year. After expiration of the initial term, this agreement shall automatically renew for successive one month periods until terminated by either party upon receipt of written notice thirty days before the end of any of these successive periods. For renewal terms, notice of adjustment in the fixed charges shall be supplied in writing not less than forty-five (45) days prior to the renewal date at which the changes will take effect.

Thus, the initial contract governed the relationship from August 1983 until August 1984, and the contract continued to renew automatically on a monthly basis until GHA notified CSI that it was discontinuing the relationship in October 1987.

Appellant Gersman is the president of CSI; he and his wife are also CSI's only shareholders. According to Gers-

man, CSI and GHA maintained a healthy working relationship until late 1986, when Mohammed Ghafori became the manager of GHA's Management Information System. Gersman alleges that Ghafori had an assistant ask Gersman whether or not he was Jewish and, upon finding that he was, determined to end the contractual relationship between CSI and GHA for that reason. While GHA had been satisfied with CSI's service prior to that time, Gersman began hearing rumors that GHA was dissatisfied. He approached GHA's upper management, who admitted awareness of Ghafori's indirect inquiry, but maintained that there was no link between this inquiry and GHA's recent dissatisfaction. In a final effort to save the contract, Gersman proposed a modification to the contract with terms more favorable to GHA. However, in October 1987, GHA notified Gersman that it was ending its contractual relationship with CSI.

CSI and Gersman brought this action in the district court, alleging that GHA's actions violated both § 1981 of the Civil Rights Act and § 1-2511 of the DCHRA. The district court dismissed both claims upon a motion by GHA, on the grounds that appellants Gersman and CSI lacked standing to bring any discrimination claims against GHA, and that the complaint failed to state a claim under either statute. Appellants then filed this appeal.

II. Discussion

A. *Standing*

The district court held that neither Gersman nor CSI had standing to bring discrimination claims against GHA. First, the court determined that Gersman lacked standing because CSI, rather than Gersman, suffered the alleged injury, as it was CSI that had been party to the contractual relationship with GHA. With this we agree. The court then determined that CSI had suffered the alleged injury, but that CSI lacked standing to litigate that injury because a corporation had no racial identity and

therefore could not be a legally cognizable victim of discrimination. This we reject.

The court relied on dicta from the Supreme Court's opinion in *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). There, the Court stated that "a corporation . . . has no racial identity and cannot be the direct target of the petitioners' alleged discrimination." *Id.* at 263. The district court found this assertion to be consistent with the nature of a corporation as a legally constructed entity with "an identity separate and distinct from that of its members or organizers."

The court implied that there may be exceptions where "a functional nexus exists between the purpose or activity of the corporation and the identity of the members of that corporation," citing the Second Circuit's opinion in *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702 (2d Cir.), *cert. denied*, 459 U.S. 857 (1982). In *Hudson Valley*, the Second Circuit held that a not-for-profit, tax-exempt theatre organization created to serve local black and Hispanic communities had standing to bring civil rights claims against county officials who allegedly denied the organization's funding application for racial reasons. The district court here ruled that even if the Second Circuit is correct, CSI gained no standing because "CSI does not serve to advance Plaintiff Gersman's racial or religious identity but simply his economic interests." Accordingly, CSI lacked a racial or religious identity and therefore had no standing to bring a discrimination claim against GHA.

In our view, however, the determination whether a corporation has a racial identity is not determinative of whether that corporation has standing to bring a discrimination claim. Rather than assume that racial identity is a predicate to discriminatory harm, we might better approach the problem by assuming that, if a corporation can suffer harm from discrimination, it has standing to litigate that harm. As the Supreme Court

stated in *Warth v. Seldin*, 422 U.S. 490 (1975), the test for prudential standing "is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Id.* at 500 (footnote omitted). Assuming § 1981 and DCHRA § 1-2511 to be applicable, we believe that both provisions can be understood to provide relief to a corporate plaintiff.

The Supreme Court has held that a party need not be a member of a protected minority in order to suffer harm from discrimination. For example, in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), a white homeowner and member of the Little Hunting Park, a nonstock corporation that operated a playground and park in the neighborhood, rented a home to a black person and attempted to transfer his share in the Park to the tenant. The Park refused to approve the assignment because the tenant was black, and expelled the white homeowner from the Park for protesting the refusal. The Supreme Court held that the homeowner had standing to bring a § 1982 action against the Park, because the homeowner was "punished for trying to vindicate the rights of minorities protected by § 1982." *Id.* at 237. According to the Court, the homeowner must have standing to bring the § 1982 action because "the white owner is at times 'the only effective adversary' of the unlawful restrictive covenant." *Id.* (citation omitted).

The Court relied on its earlier opinion in *Barrows v. Jackson*, 346 U.S. 249 (1953). In that case, a party to a restrictive covenant forbidding homeowners in the neighborhood from renting or selling their homes to non-Caucasians sued another party to the covenant for damages based on a breach of that covenant. The Supreme Court allowed the defendant to claim that the covenant violated the Fourteenth Amendment, even though the defendant herself was a white woman. The Court found that the woman had been injured by the discriminatory

covenant because her co-covenantor was seeking damages for breach of the covenant. *Id.* at 256. Moreover, the Court concluded that "[t]he relation between the coercion exerted on respondent and her possible pecuniary loss thereby is so close to the purpose of the restrictive covenant, to violate the constitutional rights of those discriminated against, that respondent is the only effective adversary of the unworthy covenant in its last stand." *Id.* at 259. Accordingly, the Court concluded that "[s]he will be permitted to protect herself and, by so doing, close the gap to the use of his covenant, so universally condemned by the courts." *Id. See also Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9, 14 (1st Cir. 1979) (" a[white] person has an implied right of action [under §§ 1981 and 1982] against any other person who, with a racially discriminatory intent, injures him because he made contracts with non-whites"); *see generally Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266 (6th Cir. 1977) (white plaintiff had standing to sue employer under § 1981 when he was fired for protesting the allegedly discriminatory firing of a black employee); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, *modified*, 520 F.2d 409 (2d Cir. 1975) (white plaintiff had standing to sue under § 1981 where he alleged his employer forced him into early retirement because he sold his home to a black person); *Faraca v. Clements*, 506 F.2d 956 (5th Cir.), *cert. denied*, 422 U.S. 1006 (1975); *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972) (allowed white plaintiff to bring § 1981 claim against employer who allegedly refused to hire him because he was married to a black woman).

Here, appellant CSI alleges that it was harmed by the discriminatory actions of GHA. As the above cases have shown, a party may suffer a legally cognizable injury from discrimination even where that party is not a member of a protected minority group. Thus, it is not necessary to determine whether CSI has a "racial iden-

tity." Such a query would lead to difficulties of determining what, in fact, constitutes a racial identity. *See, e.g., T & S Service Associates, Inc. v. Crenson*, 666 F.2d 722 (1st Cir. 1981) (requiring corporate plaintiff to prove that it was a minority-owned firm in order to bring claim that it was denied contract under § 1981); *Howard Security Servs., Inc. v. Johns Hopkins Hosp.*, 516 F. Supp. 508 (D. Md. 1981) (allowed corporation owned and operated by black president to bring § 1981 claim against hospital who allegedly denied contract because of the president's race). For example, in the present case, CSI alleges that it has a racial identity because it is operated and owned by Mr. and Mrs. Gersman, who are both Jewish. Yet the situation would be no different if Gentile shareholders owned CSI and GHA ended the contractual relationship because the corporation had a single Jewish employee. Thus, CSI need not have a "Jewish identity," or even have predominantly Jewish owners or employees, in order to suffer injury from GHA's discriminatory actions.

Therefore, we reject the analysis that a corporation may have standing to assert a discrimination claim only where the corporation has been incorporated expressly for the purpose of furthering minority interests. Because we rest our finding of standing on the fact that the injury suffered by the plaintiff falls within the zone of interests protected by the statute, we need not determine whether a corporation can in fact have a racial identity. While such a determination would be difficult to make, given that a corporation exists as an entity separate from its employees, officers and stockholders, *Moline Properties, Inc. v. Comm'r*, 319 U.S. 436, 439 (1943), the facts as alleged indicate that GHA discontinued its contractual relationship with CSI solely because an individual associated with CSI was Jewish. That injury alone is sufficient to meet the Supreme Court's test for standing. *See Allen v. Wright*, 468 U.S. 737, 751 (1984) (plaintiff

has standing if it alleges "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief").

To hold otherwise would render a whole range of discrimination claims unlitigable. As the district court correctly found. appellant Gersman was not injured by GHA's actions. It was CSI, and not Gersman, whose contract was terminated. Gersman, as a shareholder, has no standing to bring claims for an injury suffered by CSI. *See Gregory v. Mitchell*, 634 F.2d 199, 202 (5th Cir. 1981); *Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969). However, as to the district court's decision that CSI cannot seek redress solely because it is a corporate, rather than individual entity, we conclude that corporate identity is not dispositive of standing where the corporation suffered injury from allegedly discriminatory acts. Accordingly, we hold that CSI has standing to bring both the § 1981 and the DCHRA § 1-2511 claims in the present case.

B. *Section 1981 of the Civil Rights Act of 1866*

The district court ruled that the complaint in this case failed to state a claim under § 1981 of the Civil Rights Act of 1866. For purposes of reviewing this dismissal, we must accept as true all CSI's factual allegations, and determine whether the district court correctly held that "no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-56 (1957)).

Section 1981 of the Civil Rights Act guarantees to all people the right to "make and enforce contracts" under the equal benefit of the laws. As the district court correctly recognized, the controlling case interpreting the "make and enforce contracts" clause of § 1981 is *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). In that case, the Supreme Court interpreted this phrase lit-

erally to mean that § 1981 protects individuals only in the making, or formation, of contracts and in the enforcement of contracts through the legal process. Thus, the Court held that § 1981 "does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations." *Id.* at 171.[1] Under this interpretation, "postformation conduct" such as racial discrimination during a contractual term of employment is not governed by § 1981. Accordingly, the Court held that racial discrimination during a contractual term of employment is not violative of § 1981 but is controlled instead by the contractual relationship itself, and should be governed by state contract law and Title VII of the Civil Rights Act. *Id.* at 180-81.

Appellant argues first that *Patterson* does not apply to the present case; that *Patterson* is instead limited to the

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[1] The dissent cites the plurality opinion by Justice O'Connor in *Jett v. Dallas Independent School District*, 491 U.S. 701, 711 (1989), and Justice O'Connor's separate opinion in *Lytle v. Household Mfg., Inc.*, 110 S.Ct. 1331, 1339 (O'Connor, J., concurring) (1990), as support for the proposition that "*Patterson* itself did not decide whether discriminatory contract terminations were actionable under § 1981." Dissent at 1, n.1. However, neither of these cases expressed such reservation. *Jett* simply noted that the defendant school district had not "raised the contention that the substantive scope of the 'right . . . to make . . . contracts' protected by section 1981 does not reach the injury suffered by petitioner here." (*Citing Patterson, supra*, 491 U.S. at 176-77) (omissions in original). Far from expressing misgivings concerning the reach of *Patterson*, Justice O'Connor merely notes that a case decided seven days after *Patterson* rather unsurprisingly did not raise the *Patterson* arguments. Similarly, in her one-paragraph concurrence in *Lytle*, Justice O'Connor notes "that the question whether petitioner has stated a valid claim under § 1981 remains open." *Lytle*, 110 S.Ct. at 1339. However, her reason for noting that it remained open was not that the reach of *Patterson* was uncertain, but that *Patterson* "was decided after the Court of Appeals issued" the decision under review in *Lytle*, so that "the applicability of § 1981 to these claims was not specifically addressed." *Id.*

employment context. It bases this assertion on *Patterson*'s discussion of the complementary relationship between § 1981 and Title VII. *See id.* at 180-84. In determining that § 1981 does not apply to postformation conduct, the Court commented that Title VII's application to racial harassment in the employment relationship "should lessen the temptation for this Court to twist the interpretation of another statute (§ 1981) to cover the same conduct." *Id.* at 181. Thus, appellants argue, because Title VII does not apply outside the employment relationship, *Patterson*'s reasoning necessarily does not apply outside of the employment context.

This argument ignores the plain language of both § 1981 and the *Patterson* opinion. While *Patterson* did, in fact, involve an employment contract, it reached its holding by applying § 1981, a statute that applies to all contractual relationships. Indeed, the Court specifically recognized that "interpreting § 1981 to cover racial harassment amounting to a breach of contract would federalize all state-law claims for breach of contract where racial animus is alleged, *since § 1981 cover all types of contracts, not just employment contracts.*" *Id.* at 183 (emphasis added). Thus, the Court expressly recognized that its holding would be relevant beyond the scope of employment cases. *Cf., e.g., Perry v. Command Performance*, 913 F.2d 99, 101 n.3 (3d Cir. 1990) (rejecting contention that *Patterson* was limited to the employment context); *Gonzalez v. Home Ins. Co.*, 909 F.2d 716, 723 (2d Cir. 1990) (rejecting contention that § 1981 has broader scope where Title VII remedies are unavailable). Consequently, we conclude that the non-employment context does not affect *Patterson*'s applicability to the present case.

Having determined that *Patterson*'s holding applies outside the employment context, we must now determine whether, under *Patterson*, § 1981 applies to contract terminations. This is an issue of first impression before this Court. However, other courts of appeal have almost uni-

versally interpreted *Patterson* to mean that termination of a contract is not covered by § 1981 because termination constitutes postformation conduct. *See, e.g., Williams v. First Union Nat'l Bank*, 920 F.2d 232 (4th Cir. 1990); *Prather v. Dayton Power & Light Co.*, 918 F.2d 1225 (6th Cir. 1990); *Gonzalez v. Home Ins. Co.*, 909 F.2d 716 (2d Cir. 1990); *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990), *cert. denied*, 1991 U.S. Lexis 1469 (U.S. 1991); *Walker v. S. Central Bell Telephone Co.*, 904 F.2d 275 (5th Cir. 1990); *Overby v. Chevron, USA, Inc.*, 884 F.2d 470 (9th Cir. 1989).

One circuit, the Eighth, has held to the contrary. *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990), *vacated and remanded*, No. 90-324, 1990 U.S. Lexis 1652, 1990 WL 132188 (U.S. Mar. 18, 1991). Although that case was the law of the Eighth Circuit at the time of oral argument in this case, the Supreme Court has since vacated and remanded *Hicks* to the Eighth Circuit for reconsideration in light of the court's pending *en banc* opinion in *Taggart v. Jefferson County Child Support Enforcement Unit*, 915 F.2d 396 (8th Cir. 1990), *reh'g granted* Dec. 11, 1990. In the panel opinion in *Taggart*, the court expressly stated that it agreed with the majority of the other circuits which held that, under *Patterson*, § 1981 does not apply to termination cases. *Id.* at 397. Nonetheless, the *Taggart* court found itself compelled to follow *Hicks* because it remained the governing law of the circuit. The *en banc* review in *Taggart* will of course allow that circuit to reconsider its own precedent.

We agree with the majority of circuits who have held that, under *Patterson*, § 1981 does not apply to contract terminations. We find this conclusion appropriate in terms of the language of both § 1981 and the *Patterson* opinion. The Court was clear in stating that § 1981 "does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to

enforce established contract obligations." *Patterson*, 491 U.S. at 171. The Court therefore held that § 1981 does not apply to racial harassment within the contract relationship, or even racial harassment that rises to the level of a breach of contract. *Id.* at 182-83. The Court emphasized that "[c]onduct amounting to a breach of contract under state law is precisely what the language of § 1981 does not cover." *Id.* at 183.

Similarly, the language of § 1981 does not speak of contract terminations. Like breach of contract, a termination "impairs neither the right to make nor the right to enforce a contract." *Id.* A termination necessarily arises after the contract is already made, and, like a breach of contract, is more appropriately dealt with under state contract law.[2]

The dissent argues that this position is unduly formalistic, rendering meaningless the protections of § 1981 because it "prohibits an employer from refusing to hire an applicant because of her race, yet allows the employer to fire that person the next day because of her race." Dissent at 7 (emphasis deleted). The dissent cites as an example of this "formalism" the Third Circuit's opinion in *Perry v. Command Performance*, 913 F.2d 99 (3d Cir. 1990). In *Perry*, the plaintiff's husband made an appointment for the plaintiff to have her hair styled at the defendant's salon. When the first stylist was unavailable to style the plaintiff's hair, a second stylist refused to do so, stating that she did not "deal with blacks." *Id.* at 100. The Third Circuit held that § 1981 would protect the plaintiff against such discrimination only if it occurred during the making of the contract, and remanded the case for the district court to determine whether the contract

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[2] Our dissenting colleague inexplicably insists upon accusing us of "equat[ing] termination of a contract with a breach of contract." Dissent at 1. This we obviously do not do. Rather, like the Supreme Court in *Patterson*, we discuss the effect of broadening § 1981 beyond its terms in relation to both breach and termination.

was formed at the time the appointment was made or at the time the hair stylist refused service—a distinction the dissent describes as illustrating the "pitfalls of the timing-related formalism." Dissent at 3. However, the *Perry* Court went on to state that, even if the contract were made at the time the husband made the appointment, such a contract would violate § 1981 if the contract were made on discriminatory terms, *i.e.*, if it were implicit in the contract that the salon would provide services to the petitioner only if she were white. If this were the case, the court concluded that "it would be consistent with *Patterson* to allow plaintiff to proceed with her section 1981 claim." *Id.* at 102.

Here, there is no indication that, at the time the contract was made, an implicit condition of the contract was that Gersman not be Jewish. In the scenarios described by the dissent, however—where an employee is hired one day under the strictures of § 1981 and fired the next—the discrimination would be implicit in the making of the contract as well as the termination. While that situation is not before us, the Third Circuit may well be correct that it would be covered by § 1981 under *Patterson* because the contract would have been made under discriminatory terms. In short, we follow *Patterson* by its terms, in its construction of § 1981 to govern contract formation and enforcement, not all contract-related incidents.

Given this conclusion, we must now discern whether GHA's actions in the present case did in fact "terminate" the contract. Appellants argue that GHA did not terminate the contract, but instead refused to renew the contract for the next month. However, the contract at issue in this case did not require the parties to reach a new agreement at the beginning of every month. Rather, the contract renewed until the parties took an affirmative action to terminate it. *Cf., e.g., Chawla v. Klapper*, 743 F. Supp. 1284 (N.D. Ill. 1990) (contract was terminated

where defendant declined to continue renewal of series of one-year teaching contracts). In this way, the contract resembled an employment-at-will contract.

In the context of an employment-at-will contract, the Seventh Circuit rejected an argument similar to appellant's claim here that each monthly renewal constituted a new contract. *McKnight v. General Motors Corp.*, 908 F.2d at 109. In *McKnight*, the court found that "[e]mployment at will is not a state of nature but a continuing contractual relation. Wages, benefits, duties, working conditions, and all (but one) of the terms are specified and a breach of any of them will give the employee a cause of action for breach of contract." *McKnight*, 908 F.2d at 109 (citations omitted). Similarly, all the terms of the relationship between the parties to the present case were governed by the terms of the original contract.

Appellants base their claim on *Nelson v. School Bd. of Palm Beach County*, 738 F. Supp. 478 (S.D. Fla. 1990). In that case, the district court held that the plaintiff had made out a valid § 1981 action when her contract as a school principal expired and the school district declined to renew her contract for another term as principal, transferring her instead to the position of classroom teacher. Contrary to appellant's interpretation, *Nelson* did not rest its finding of standing simply on the school board's failure to renew the plaintiff's contract, but also on her commensurate demotion. In *Patterson*, the Court recognized that a contractual relationship could change to such a degree that it would constitute a new contract. The Court found that a promotion could be considered a "new" contractual relationship, depending "upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract." *Patterson*, 491 U.S. at 185. A promotion involves such an opportunity "[o]nly where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer." *Id.* (citation omitted).

Appellants argue that the fact that the parties were free to modify the contract terms governing price, and that, in September, appellants proposed a new price structure that GHA never accepted, establish that the parties had the opportunity to enter a "new" contract at each renewal period. These factors, they argue, indicate that the contract was a "new" contract each month, and that the monthly renewals and modifications should be considered preformation conduct. However, as the district court pointed out, both the renewals and modifications were expressly governed by the terms of the contract—the activities appellants label "preformation" were actually "postformation" actions taken pursuant to the existing contract.

Moreover, CSI's offer of more favorable terms to GHA is insufficient to create a "new" contractual relationship as required by *Patterson*. *See Chawla*, 743 F. Supp. at 1291 (a "new" contract begun each year on the same terms as the prior contract does not fit within the *Patterson* exception). For example, in *Harrison v. Associates Corp. of North America*, 917 F.2d 195 (5th Cir. 1990), the Fifth Circuit held that a promotion did not constitute a new contractual employment relationship because it involved only a small raise, with no "significant change in duties and responsibilities." *Id.* at 198; *see also Green v. Kinney Shoe Corp.*, 728 F. Supp. 768, 777 (D.D.C. 1989) (promotion constituted a "new and distinct" contractual relationship where it involved different responsibilities, as well as a new means of evaluating employee and calculating employee's salary). Because the parties' obligations to one another did not change upon any of the contract "renewals," we conclude that GHA and appellants were engaged in a continuous contractual relationship, and that GHA's actions in this case terminated that contractual relationship.

Thus, as § 1981 does not apply to terminations of contractual relationships, we conclude that appellants fail to

state a claim under § 1981. We therefore affirm the district court's decision to dismiss this action for a failure to state a claim.

C. *District of Columbia Human Rights Act Section 1-2511*

The District of Columbia Human Rights Act guarantees that

> [e]very individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District and to have an equal opportunity to participate in all aspects of life, including, but not limited to, in employment, in places of public accommodation, resort or amusement, in educational institutions, in public service, and in housing and commercial space accommodations.

D.C. Code Ann. § 1-2511. Although appellant CSI recognizes that its claims do not fall within the categories listed in § 1-2511, it claims that GHA's actions deprived CSI of the opportunity to participate equally in the economic life of the District of Columbia. Appellant focuses on the phrase "including, but not limited to," as implying that § 1-2511 may be interpreted to include such actions as wrongful termination of a contract.

The district court held that § 1-2511 protects only those activities that are specifically enumerated within the statute. The court rejected appellant's claim that the DCHRA's general protection of an individual's equal opportunity to participate in the economic life of the District prohibited GHA's allegedly discriminatory termination of the contract. According to the court, "deciding what conduct constitutes an impingement of opportunity to participate in the 'economic life' of the District of Columbia" would be to open a "Pandora's box." The court concluded that it was "unwilling[] to assume the role of legislator," and left the phrase "economic life" to be fleshed out by future legislation.

At the time of the district court's decision, there were no opinions by District of Columbia courts to guide the court in interpreting § 1-2511. Since that time, however, two relevant opinions have been released; *Sorrells v. Garfinkel's, Brooks Bros., Miller & Rhoads, Inc.*, 565 A.2d 285 (D.C. 1989), and *Justice for Janitors v. Apartment & Office Bldg. Owners Ass'n, Memorandum Opinion and Order*, Civ. No. 88-09695 (D.C. Super. Ct. Dec. 4, 1989). In *Sorrells* the plaintiff argued that her wrongful discharge claim constituted a cause of action under the DCHRA as a whole. The court rejected this claim, noting that the plaintiff did not "rely on any specific provision of the Human Rights Act; rather she asks this court to 'broaden' the policies expressed in the Human Rights Act and to fill a perceived 'gap' in the Act." *Sorrells*, 565 A.2d at 289. The court relied on the absence of language directed toward wrongful discharge actions, emphasizing that the court "cannot rewrite [the Act] or extend its coverage beyond the limits set by the legislature." *Id.* In the court's view, the plaintiff's claim was "an invitation to judicial activism, which we unequivocally decline." *Id.*

Justice for Jantors dealt expressly with the provision at issue in this case, § 1-2511, as well as § 1-2501. In that case, a union of janitors claimed that the defendant association of apartment and office building owners violated the DCHRA by barring union janitors from their property. The court rejected the janitors' argument that "the expansive language of D.C. Code § 1-2501 and 2511 provide the statutory authority for a cause of action for discrimination based on a characteristic not specifically identified in the act." *Justice for Janitors, Memorandum Opinion and Order*, at 11. The court emphasized that § 1-2511 did not create any rights, and that language relating to the Act's purpose was merely "hortatory and without substantive effect." *Id.* at 12.

Because we are interpreting the laws of the District of Columbia, we are obliged to follow the interpretation of the District's own courts. *Hall v. Ford*, 856 F.2d 255, 267 (D.C. Cir. 1988) ("In considering [a] pendant claim, we are of course bound by the law of the District of Columbia, as authoritatively interpreted by the D.C. Court of Appeals."). Moreover, the cases are consistent with the district court's appropriate conclusion that we risk judicial activism by interpreting the phrase, "an equal opportunity to participate fully in the economic . . . life of the District" beyond the scope of those activities specifically enumerated in the statute. Since the District of Columba courts have declined to extend their interpretation of the statute outside the scope of the enumerated protection activities, we decline to do so as well. We therefore affirm the district court's conclusion that CSI's complaint does not state a claim under DCHRA § 1-2511.

III. Conclusion

For the foregoing reasons, we conclude that appellant CSI, and not appellant Gersman, has standing to bring the present claims. However, we agree with the district court that CSI's complaint fails to state a claim under either 42 U.S.C. § 1981 or DCHRA § 1-2511. The decision of the district court is therefore

Affirmed.

WALD, *Circuit Judge*, dissenting as to Part II.B.: I dissent from the majority's holding that 42 U.S.C. § 1981 does not guarantee freedom from discriminatory contract terminations on the basis of race or creed. I believe that a reasonable interpretation of § 1981's equal "right [] to make [] contracts" necessarily includes the right to be free from discriminatory termination of those contracts and that *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), supports such an interpretation. Accordingly, in my view, the appellants have stated a valid claim under § 1981.

I.

The majority offers two arguments in support of its holding that racially motivated contract terminations are not actionable under § 1981.[1] First, the majority contends that *Patterson* establishes that the scope of § 1981 does not extend to "postformation conduct" and that, therefore, contract termination (which indisputably occurs "postformation") is not actionable under that section. Second, the majority equates termination of a contract with a breach of contract. Since *Patterson* indicated that racial harassment to the point of breach was beyond the scope of § 1981, the majority argues that contract terminations are similarly not actionable under that section. I believe that each of these arguments is infirm.

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[1] *Patterson* itself did not decide whether discriminatory contract terminations were actionable under § 1981. *See Jett v. Dallas Independent School District*, 109 S. Ct. 2702, 2709 (1989); *Lytle v. Household Manufacturing, Inc.*, 110 S. Ct. 1331, 1339 (O'Connor, J., concurring) (1990). The Seventh Circuit also recognized as much, stating:

> We show no disrespect to the Supreme Court by suggesting that the scope of *Patterson* is uncertain. The glory of the Anglo-American system . . . is that general principles are tested in the crucible of concrete controversies. A court cannot be assumed to address and resolve in the case in which it first lays down a rule every controversy within the semantic reach of the rule.

Malhotra v. Cotter & Co., 885 F.2d 1305, 1312 (7th Cir. 1989).

A.

The majority's "postformation" argument is flawed in two ways. First, the analysis relies on selective quotations from the *Patterson* opinion. Throughout *Patterson*, the Court spoke not simply of "postformation conduct" but more precisely of "postformation conduct by the employer *relating to the terms and conditions of continuing employment*." 109 S. Ct. at 2374 (emphasis supplied). *See also id.* at 2372 ("problems that may arise later from the conditions of *continuing* employment"); *id.* at 2373 ("postformation conduct [that] implicates . . . the conditions of *continuing* employment"); *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1260 (6th Cir. 1990) (Boggs, J., disenting). Termination, although irrefutably "postformation," does not concern "*continuing* employment"—but rather the very *dis*continuation of employment. The holding of *Patterson* was that harassing conduct in the course of continuing employment was not actionable under § 1981; that case said nothing about the complete termination of employment.

More critically, the majority's argument depends almost entirely on drawing very fine and formal distinctions among three concepts: "refusal to contract," "contract termination," and "refusal to renew a contract"—even when actual events indicate that any or all of these concepts might apply. The majority contends that the first of these (refusal to contract) is always actionable under § 1981; that the second (contract termination) is never actionable; and that the third (refusal to renew) is sometimes actionable. Accordingly, the sometimes-metaphysical distinctions among these three concepts are outcome-determinative.

For example, in this case, CSI heard rumors of Group Health's dissatisfaction with CSI's services and, in mid-September 1987, promptly offered to lower the price for its services. Group Health rejected the offer and, on October 6, 1987, gave notice that it was cancelling its contract

with CSI. The majority holds that Group Health's rejection of CSI's new offer was not a refusal to contract but rather the termination of an existing contract. Similarly, the majority holds that Group Health's cancellation of the automatically renewing contract was not a refusal to renew but instead also a contract termination. Therefore, the majority concludes, neither of Group Health's actions falls within the scope of § 1981.

As this scenario indicates, there are two types of formalism at work here. The first is the formalism of classification: for example, was Group Health's rejection of CSI's new offer a (possibly actionable) refusal to renew—or a (never actionable) termination? The survival of CSI's cause of action turns on this characterization. A second and equally Orwellian formalism is implicated by the timing of the parties' actions: under the majority's analysis, if CSI had made a second offer just a few days later—for example, on October 7, *just after Group Health terminated the contract*—then Group Health's rejection of the new offer would presumably have constituted a refusal to contract and would therefore be actionable under § 1981.

The pitfalls of the timing-related formalism are illustrated by the Third Circuit's recent decision in *Perry v. Command Performance*, 913 F.2d 99 (3d Cir 1990). In that case, Perry's husband telephoned a hair salon to set up an appointment for his wife. The scheduled hairdresser fell ill and Abbott was asked to style Perry's hair. Abbott, however, balked and "responded loudly, 'No, no, no, no! I don't do black hair. . . . Oh, no, I'm not going to do your hair, I'm from New Hampshire and I don't deal with blacks.' " *Id.* at 100. The Third Circuit, applying reasoning similar to the majority's, remanded the case to the district court for a finding of when the contract between Perry and the salon was formed. Under this analysis, Perry's § 1981 cause of action turns solely on whether her contract with the salon was made when her

husband set the appointment. If it was, then Abbott's refusal to serve Perry constituted contract termination, and was not barred by § 1981; if, however, a contract for a hair stylist's services is created only when performance begins, then Abbott's action was a refusal to contract, and *was* barred by § 1981.[2]

The real world of contract belies such stark formalisms. In the context of automatically renewing contracts—such as CSI's agreement with Group Health or the standard employment-at-will contract—termination and a refusal to renew are, for all intents and purposes, the same thing, In such situations, it is pointless (or, what is worse, conclusory) to quibble over whether the cancellation of a contract is "preformation" or "postformation" conduct—cancellation is *both*: it is both the end of an existing contract and a refusal to enter into a new contract. Despite these realities, the majority's analysis hangs precariously upon such ethereal distinctions. Such formalism, I believe, is both unsound and inappropriate in basic civil rights law.

B.

The majority's second argument is also infirm. *Patterson*, the majority notes, held that harassment—including harassment amounting to a breach of contract—is not actionable under § 1981. The majority likens termination to harassment to the point of breach and concludes that termination is also not actionable under § 1981. *See* Majority opinion ("Maj. op.") at 11. But the majority's analogy is flawed: termination is critically different from both harassment and breach.

As recognized in a range of legal contexts, a contract consists of a bundle of rights. *Cf. Hishon v. King & Spaulding*, 467 U.S. 69, 74-75 (1984); *Perry v. Sinder-*

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[2] For a further discussion of such anomalies, *see* Burton, *Racial Discrimination in Contract Performance*, 25 Harv. C.R.-C.L. L. Rev. 431, 431-33 (1990).

mann, 408 U.S. 593 (1972). An employment contract, for example, encompasses, *inter alia*, claims to certain wages, benefits, privileges, work conditions, and remedies. Harassment or other discrimination in the performance of a contract deprives the target of one or more of these claims. Even when a party is harassed to the point of breach, she retains her rights under the contract and can enforce the contract under state law. But contract *termination*, in contrast, strips a target of *all* of her claims, of the entire bundle of rights.[3] And in this critical way, termination is different in kind from harassment or breach.

The *Patterson* Court itself made this distinction in holding that, while there would ordinarily be no cause of action for a discriminatory failure to promote, if "the promotion rises to the level of an opportunity for a *new and distinct relation* between the employee and the employer," § 1981 would be implicated. 109 S. Ct. at 2377 (emphasis supplied) (citing *Hishon*). To extend the metaphor, a failure to promote is not actionable under § 1981 if the new position would alter only a few sticks in the bundle (by providing a pay raise, or a new office, or a new title), but rather only if the new position effectively involved an entirely new bundle of rights—such as the move from law associate to partner in *Hishon*. By severing *all* relations between the parties, termination represents an even more dramatic change than a *Hishon*-type promotion and so falls completely outside of *Patterson*'s holding.

This understanding of § 1981's protection against discriminatory termination is also supported by the Supreme Court's rulings on the scope of § 1982, which guarantees all persons equal rights "to inherit, purchase, sell, hold

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[3] The majority's suggestion that a "termination . . . is more appropriately dealt with under state contract law," Maj. op. at 11, seems to confuse *termination* with *breach*. Like the plaintiff in this case, most terminated parties in a commercial contract would have *no* state contract law claim.

and convey real and personal property." 42 U.S.C. § 1982.[4] The Court has frequently ruled that § 1982 bars racially-motivated refusals to sell or rent property. *See, e.g., Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Tillman v. Wheaton-Haven Recreation Association, Inc.*, 410 U.S. 431 (1973). However, in *Memphis v. Greene*, 451 U.S. 100 (1981), the Court indicated that not all infringements on the use of property were within the reach of § 1982. In *Greene*, the city closed the main thoroughfare between an all-white neighborhood and a predominantly black neighborhood. Although the closing was found to "inconvenience" black residents, the Court concluded that such an injury "does not involve any impairment of the kind of property interests that we have identified as being within the reach of § 1982." *Id.* at 124. As in property, so as in contract: although a partial deprivation of equal rights is not actionable, a total deprivation is actionable.

Thus, contrary to the suggestion of the majority, there is a critical difference between breach and termination, between Patterson's harassment and Group Health's rescission: while Patterson retained some rights under her contract, CSI was left with *no* contractual rights whatsoever. Simply put, discriminatory contract termination involves nothing less than the complete *un*making of contracts and thus falls squarely within the scope of § 1981's guarantee of "the same right [to] make [] contracts."

II.

Ultimately, the shortcomings of the majority's analysis stem from its constricted interpretation of § 1981. In

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[4] Because the "operative language of both § 1981 and § 1982 is traceable to the [Civil Rights] Act of [] 1866," the Supreme Court has suggested that, whenever possible the two sections be given a common interpretation. *Tillman v. Wheaton-Haven Recreation Association, Inc.*, 410 U.S. 431, 439-40 (1973); *see also Shaare Tefila Congregation v. Cobb*, 107 S. Ct. 2019 (1987).

narrowly interpreting § 1981's guarantee to "[a]ll persons [of] the same right . . . to make and enforce contracts" the majority must distinguish "formation" from "termination" and "renewal" and ends up entangle in legal formalisms and distinctions that are analytically unsatisfying.

I would apply a more straightforward interpretation of § 1981. In my view, § 1981's guarantee of "the same right [] to make [] contracts" prohibits persons from refusing to stand in a contractual relationship with another party solely because of that party's race. Whether that refusal takes the form of a refusal to contract, a termination, or a refusal to renew a contract makes no difference. In each case, one party is wholly denied the opportunity to engage in contractual relations on the basis of his race. Interpreting § 1981 in this way, I believe that freedom from racially-motivated termination of a contract is, both practically and logically, an inextricable aspect of the equal right "to make [] contracts." [5]

As a practical matter, if § 1981 prohibits an employer from refusing to hire an applicant because of her race, yet allows the employer to *fire* that person the next day because of her race, then the law's promise of "the same right [] to make [] contracts" is empty. Section 1981 cannot meaningfully be interpreted to distinguish between the employer who says to an applicant face-to-face "I would hire you, but for your race" and the employer who hires a person sight unseen and then, upon meeting him, promptly fires him because of his race. In real-life terms, the employee who is not hired and the employee who is

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[5] The legislative history of § 1981 strongly supports this understanding of the equal "right [] to make [] contracts." *See Hicks v. Brown Group, Inc.*, 902 F.2d 630, 642-48 (8th Cir. 1990), *vacated*, 1991 U.S. Lexis 1652; *see also* Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 Yale L.J. 541 (1989).

fired end up in precisely the same place: without a job because of the color of their skins.

As a logical matter as well, the equal right to make contracts necessarily encompasses the freedom from racially-motivated contract terminations. Stated broadly, contracts and contract law comprise an effort to reduce future uncertainty in social interaction, to forge predictability by melding the institution of promises and the rule of law. As the opening sentence of Corbin's classic treatise states: "The main purpose of contract law is the realization of reasonable expectations induced by promises." 1 *Corbin on Contracts* § 1 (1963). By enacting § 1981, Congress established that this basic form of power —the power to use legal institutions to reduce uncertainty about the future—must be equally available to persons of all races.[6] Congress' intent is as thwarted by the racially-motivated termination of contracts as it is by the racially-motivated refusal to contract. Either practice denied an individual equal access to contracts and contract law, and either practice is a violation of § 1981.

In sum, like the Eighth Circuit panel whose decision is now pending reconsideration, I conclude that "[t]he right to make contracts would be rendered virtually meaningless unless it encompasses the right to be free from discriminatory deprivations of such contracts." *Hicks v. Brown Group, Inc.*, 902 F.2d 630, 639 (8th Cir. 1990), *vacated*, 1991 U.S. Lexis 1652. Any narrower interpretation of § 1981 is both analytically unsatisfying and morally troubling.

For these reasons, I respectfully dissent.

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[6] This view of § 1981 makes sense of that section's protection of both the right to "make" and the right to "enforce" contracts. If discriminatory conduct takes place *within* a contract (such as breach or harassment), a plaintiff can seek redress in contract law and § 1981 need only protect the plaintiff's access to the courthouse (the right to "enforce"), if, however, discriminatory conduct fully bars a plaintiff's access to contracts and contract law and derprives her of a contract-law remedy (as does termination), § 1981 creates a more substantive cause of action (the right to "make" contracts).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 88-1820

ALAN F. GERSMAN, *et al.*,
Plaintiffs,

v.

GROUP HEALTH ASSOCIATION, INC.,
Defendant.

Nov. 13, 1989

David H. Shapiro, Kator, Scott & Heller, Washington, D.C., for plaintiffs.

Anita Barondes, Robert Shea, Seyfarth, Shaw, Fairweather & Geraldson, Washington, D.C., for defendant.

MEMORANDUM OPINION AND ORDER

REVERCOMB, District Judge.

Plaintiffs Computer Security International, Inc. (CSI) and Alan F. Gersman claim that the Defendant Group Health Association, Inc. violated the District of Columbia Human Rights Act (DCHRA), D.C. Code § 1-2501 *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981, by terminating a contract with Plaintiff CSI solely because Plaintiff Gersman, the president and principal stockholder of Plaintiff CSI, is Jewish. This matter is before the Court pursuant to Defendant's motion to dis-

miss Plaintiffs' complaint for failure to state a claim and because neither Plaintiff has standing to bring this action. FED.R.CIV.P. 12(b)(6).

A. Statement of Facts

For purposes of a Rule 12(b)(6) motion to dismiss this Court must accept all well-pleaded facts in the Plaintiffs' complaint as true. *Stewart v. District of Columbia Armory Bd.*, 863 F.2d 1013, 1014 (D.C.Cir. 1988). Plaintiff CSI and Defendant entered into a contract with each other in August 1983 whereby Plaintiff CSI agreed to store Defendant's computer software generated in the course of its business. The contract provided for a one-year term with automatic renewal for successive one-month periods until either Party provided thirty-days notice of termination.[1] The contract further provided that "[f]or renewal terms, notice of adjustment in the fixed charges shall be supplied in writing not less than forty-five (45) days prior to the renewal date at which the charges will take effect." The agreement remained in effect between the Parties as they had originally contemplated until Defendant terminated it in November 1987.

In the latter part of 1986 Mr. Mohammad Ghafori became the operations manager of Defendant's Management Operations System. In August 1987, Mr. Adel Nakhla, an assistant to Mr. Ghafori, met with Plaintiff Gresman and asked him, under the direction of Mr. Ghafori, if Plaintiff Gersman were Jewish to which he answered yes. Prior to the above incident Defendant had consistently expressed its satisfaction with Plaintiff CSI's

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[1] The contract provided:

> The initial term of this agreement shall be for *1 year* month(s). After expiration of the initial term, this agreement shall automatically renew for successive one month periods until terminated by either party upon receipt of written notice thirty days before the end of these successive periods.

services but after the incident Plaintiff Gersman began hearing rumors that Defendant was dissatisfied. Plaintiff Gersman approached the highest level managers of Defendant who, while admitting that the inquiry about Plaintiff Gersman's heritage had occurred, did not take measures to rectify the situation. On October 6th, 1987, one of Defendant's employees, under the direction of Mr. Ghafori, refused to renew Defendant's contract with Plaintiff CSI.

B. Section 1981

Count II of Plaintiffs' complaint alleges that the Defendant violated § 1981 "by abridging plaintiffs the rights to make and enforce contracts" because Plaintiff Gresman is Jewish.[2] This Court rules that Plaintiffs have failed to state a claim under section 1981 in light of the Supreme Court's recent decision in *Patterson v. McLean Credit Union*, —— U.S. ——, 109 S.Ct. 2363, 105 L.Ed. 2d 132 (1989).

In *Patterson*, an employee alleged that her employer had harassed and failed to promote her on the basis of race in abridgment of her right to make and enforce contracts. The Court held that the employee did not have a cause of action on the basis of the alleged harassment under § 1981 because the contracts clause applied only to the formation of contracts and the enforcement of contracts through the legal process. The employer's alleged harassment constituted "postformation conduct . . . relating to the terms and conditions of continuing employ-

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[2] Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the "same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exacations of every kind, and to no other.

ment," *id.* 109 S.Ct. at 2374, which was not within the scope of § 1981:

> [T]he right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established including breach of the terms of the contract or imposition of discriminatory working conditions. Such post-formation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment. . . .

Id. at 2373.

In regard to the employer's alleged failure to promote the employee on the ground of race the Court recognized that in some instances an employer's failure to promote an employee could constitute a refusal to enter into a new contract but cautioned that "[o]nly where the promotion raises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under § 1981." *Id.* at 2377.

In the instant case, the Defendant argues that it simply terminated an exising contract with Plaintiff CSI and that its action accordingly constitutes postformation conduct not within the scope of § 1981. The Plaintiffs, on the other hand, contend that the original contract terminated on its own terms after one year and that the Parties subsequently entered into a series of new contracts for one-month terms. Accordingly, the Plaintiffs characterize the Defendant's failure to renew the contract not as a termination of an existing contract but as a refusal ot enter into a new contract.

The provision that the contract would be automatically renewed at the end of one year for successive one-month periods unless either Party affirmatively terminated the contract was a result of the negotiations of the Parties

in the first instance. It is illogical to argue that when the automatic renewal provision took effect within the original contemplation of the Parties new and distinct contracts were created. These automatic renewals occurred *precisely because* they were provided for in the contract formed in 1983. The decision of the Defendant to terminate the contract was premised upon and consistent with the terms of the 1983 contract and accordingly constitutes postformation conduct.

The Plaintiffs further contend that each one-month term constituted a new contract because either Party could upon proper notice renegotiate the price term for any given one-month term. The Plaintiffs contend that since the price term is fundamental to a contract then any opportunity for renegotiation of price necessarily "rises to the level of an opportunity for a new and distinct relation" between the Parties. Again, however, this provision for price negotiation is precisely a term of the original contract upon which the Parties would necessarily have to rely in order to effectuate a change in the price term.

Even if this Court were to accept Plaintiffs' position that the automatic one-month renewals and opportunities to renegotiate the price term result in new and distinct contracts, this Court understands *Patterson* to require more than merely a formal change in the relationship between the Parties premised on state contract law. *See Patterson*, 109 S.Ct. at 2375-76 (the substantive content of § 1981 is clearly independent of the terms of any particular contract and of state contract law). Where the Supreme Court held in *Patterson* that the employer's failure to promote an employee could *in some instances* constitute a failure to make a contract it necessarily was contemplating that the promotion would provide a fundamental and significant change in the status of the employee with the empyoyer; otherwise, the Supreme Court would have held more categorically that *any* failure to

promote the employee would constitute a claim under § 1981. To accept Plaintiffs' position that any opportunity to renegotiate price term constitutes a new contract would be an unreal view of the continuing relationship between the Parties where the only term which was subject to renegotiation was price and the duties and rights of the Parties otherwise remained constant. The Court in *Patterson* has directed that a "lower court should give a fair and natural reading to the statutory phrase 'the same right . . . to make . . . contracts,' and should not strain in an undue manner the language of § 1981." 109 S.Ct. at 2377. The Supreme Court's direction is well-heeded in the instant case.

C. DCHRA

The Plaintiffs concedes that the Defendant's termination of its contract with Plaintiff CSI for discriminatory reasons is not covered under any of the specifically cited prohibitions in § 1-2511 of the DCHRA but contend that the D.C. Council did not intend those specific prohibitions to be an exhaustive list. Rather, the Plaintiffs claim, the DCHRA covers any conduct which deprives individuals of their "rights to be free from discrimination in their participation in the economic life of the District of Columba." *Plantiffs' Complaint* ¶ 20. Plaintiffs have cited no caselaw to support their position and both Parties agree that the issue—whether conduct which is not specifically enumerated under the DCHRA can nonetheless be prohibited if a court finds that the conduct impinges upon an individual's equal right to fully participate in the "economic life" of the District of Columbia—is one of first impression.

Section 1-2511 provides:

> Every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District and to have an equal opportunity to participate in all aspects of life, in-

> cluding, but not limited to, in employment, in places of public accommodation, resort or amusement, in educational instiutions, in public service, and in housing and commercial space accommodations.

Although the "including, but not limited to" language of this section at first blush suggests that the enumerated prohibitions are not exclusive under the DCHRA, this Court finds that when the sections of the statute are analyzed not in isolation but as they relate to each other it is manifestly clear that the D.C. Council was legislating only against the discriminatory conduct specifically enumerated in § 1-2511.

Under the doctrine of *ejusdem generis* specific language governs over general language. *See Vann v. District of Columbia Bd. of Funeral Directors and Embalmers*, 408 A.2d 688, 695 (D.C. 1984). This doctrine is all the more compelling when § 1-2511 is read in relationship to the other sections within Subchapter 11 of the DCHRA entitled *Prohibited Acts of Discrimination.* For every enumerated prohibition in § 1-2511 the D.C. Council specifically enacted in subsequent sections detailed legislation on that prohibited conduct. In separate and distinct sections following § 1-2511 the DCHRA prohibits discrimination in employment, § 1-2512, real estate transactions, §§ 1-2515, 1-2516, 1-2517, public accommodations, § 1-2519, educational institutions, § 1-2520, and the sale of motor vehicle insurance. § 1-2533. Thus, the D.C. Council specifically was aware of specific conduct that it wanted to prohibit in § 1-2511 and provided subsequent sections to cover that conduct while providing no legislation on what constitutes conduct that would otherwise be prohibited under the general rubric of "economic life." *See Vann v. Bd. of Funeral Directors and Embalmers*, 480 A.2d at 695 (general language of introduction refers only to conduct as listed in subsequent subsections of the statue); *see also Air Transp. Ass'n v. Federal Energy Office*, 382 F.Supp. 437, 445 (D.D.C.

1970), *aff'd*, 520 F.2d 1339 (Temp.Emer.Ct.App.1975); *Bissette v. Colonial Mortgage Corp.*, 477 F.2d 1245, 1246 n. 2 (D.C.Cir.1973); *accord Council of Hawaii Hotels v. Agsalud*, 594 F.Supp. 449, 453 (D.Haw.1984) ("A general statutory section setting forth legislative policy and purpose neither constitutes an operative section of the statute nor prevails over more specific provisions").

This Court is unable from the statute to determine what conduct the D.C. Council possibly could have intended to prohibit when it used the general language "economic life" in the introductory section of Subchapter II. This court is unwilling to open the Pandora's box in deciding what conduct constitutes an impingement of opportunity to participate in the "economic life" of the District of Columbia. Plaintiffs in essence are requesting that this Court act as a legislator which, respectfully, is a job more appropriate for the D.C. Council. The D.C. Council is in the better position to determine not only what conduct specifically impinges upon an individual's right to participate in the "economic life" of this city but, more fundamentally, whether all such conduct should be prohibited. This Court notes that even in areas in which the D.C. Council has specifically prohibited discrimination it has nonetheless provided for exceptions after determining that legitimate grounds exist in some instances to permit discriminatory conduct. *See* § 1-2513 (exceptions in employment for seniority systems and officer cadet programs); § 1-2518 (exceptions in housing for owner-occupied buildings); § 1-2521 (sex and age exceptions in educational institutions for private undergraduate and primary schools).

This Court's unwillingness to assume the role of legislator is all the more necessary where the D.C. Council has provided the D.C. Office of Human Rights with the mandate to investigate discrimination in accordance with the statements of purpose in §§ 1-2501 and 1-2511 for the *express reason* of "making appropriate recommendations

for action, including legislation, against such discrimination." D.C. Code § 1-2541(b). Where the statutory scheme establishes an executive agency to investigate and recommend whether the D.C. Council should enact future legislation to prohibit certain discriminatory conduct in accordance with § 1-2511 and D.C. Council obviously could not have intended that discrimination in all aspects of economic life was covered under the statute; otherwise, § 1-2541(b) would be gratuitous.

D. Standing

Even if the Plaintiffs were able to state a cause of action under § 1981 or the DCHRA, the Plaintiffs would not be able to proceed with these claims on the ground that they both lack standing.

1. Plaintiff Gersman

Plaintiff Gersman concedes that he has no standing to redress an injury to Plaintiff CSI under § 1981 even though he is its president and principal shareholder. *See Gregory v. Mitchell*, 634 F.2d 199, 202 (5th Cir.1981) (officers and shareholders cannot maintain action under Civil Rights Act of 1871, 42 U.S.C. § 1983, on behalf of corporation); *Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir.1969) (president and general manager of corporation who, with his wife, owned all the stock of corporation could not maintain action under 42 U.S.C. § 1983 to redress injury to corporation); *T & S Serv. Assocs., Inc. v. Crenson*, 505 F.Supp. 938, 943 (D.R.I.) (sole shareholder of corporation had no standing to maintain action under section 1981 to address injury to corporation), *vacated and remanded on other grounds*, 666 F.2d 722 (1st Cir.1981). Plaintiff Gersman nonetheless contends that he has standing to sue for his own injuries, namely, humiliation, that he suffered as a witness to Defendant's termination of the contract with Plaintiff CSI. However, Plaintiff CSI suffered the discriminatory

conduct, or injury in fact, and not Plaintiff Gersman. There is no action under either section 1981 or the DCHRA for third parties who suffer emotional injury after witnessing discriminatory conduct to others regardless of the nature of the relationship between the witness and the injured party.

2. Plaintiff CSI

Defendant contends that Plaintiff CSI does not have standing to sue under the DCHRA and § 1981 because corporations are legal entities separate and distinct from the religious and racial identities of the individuals who comprise the corporation. Plaintiff CSI argues that because the corporation is closely held by Plaintiff Gersman and his wife the identity of the corporation is therefore Jewish. The case-law is split in the lower courts on whether a corporation can possess the identity of its members for purposes of a cause of action for discrimination.

In *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), the Supreme Court stated that "a corporation . . . has no racial identity and cannot be the direct target of the alleged discrimination." *Id.* at 263, 97 S.Ct. at 562. Although, as both Parties recognize, this language is dicta, the statement does not stand in jurisprudential isolation but is predicated on the long-standing recognition that a corporation is a creation of state law with the intent that it have an identity separate and distinct from that of its members or organizers. *See Moline Properties v. Commissioner*, 319 U.S. 436, 439, 63 S.Ct. 1132, 1134, 87 L.Ed. 1499 (1943). Accordingly, this Court declines to treat the language as dicta and rules, as have other lower courts interpreting *Village of Arlington Heights*, that a corporation can have no religious or racial identity. *See, e.g., Triad Assocs., Inc. v. Chicago Hous. Auth.*, 1988 WL 6667, 1988 LEXIS 582, No. 87 C 5096 (N.D. Ill. Jan. 27, 1988).

Even if a corporation could assume the racial or religious identity of its members, this Court would still rule that Plaintiff CSI did not have standing to bring this action. In *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702 (2d Cir.1982), the court held that a corporation possesses a racial or religious identity to have standing to bring an action for racial discrimination under 42 U.S.C. §§ 1981 and 1983 only where a functional nexus exists between the purpose of activity of the corporation and the identity of the members of that corporation. *Id.* at 705-06. In *Hudson Valley Freedom Theater, Inc.*, the plaintiff was a nonprofit corporation "established for the very purpose of advancing minority interests," *id.* at 706, specifically, promoting black and Hispanic culture.

In the instant case, Plaintiff CSI is merely a vehicle by which Plaintiff Gersman has chosen to earn his living and the corporate purpose is independent of Plaintiff Gersman's religious faith or racial identity. In other words, Plaintiff CSI does not serve to advance Plaintiff Gersman's racial or religious identity but simply his economic interests. Although other courts have found that a corporation can have a racial or religious identity by the mere fact that it is owned or controlled by members of a protected class, *see e.g., T & S Serv. Assocs. v. Crenson*, 505 F.Supp. at 943; *Howard Sec. Servs., Inc. v. Johns Hopkins Hosp.*, 516 F.Supp. 508, 513 (D.Md.1981), this Court finds them unpersuasive.

Accordingly, it is hereby

ORDERED that Defendant's motion to dismiss Plaintiffs' complaint is GRANTED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5482

ALAN F. GERSMAN, *et al.*,
Appellants

v.

GROUP HEALTH ASSOCIATION, INC.

Before: Wald, Buckley and Sentelle, Circuit Judges

ORDER

[Filed July 5, 1991]

Upon consideration of appellants' petition for rehearing, filed June 6, 1991, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Wald would grant the Petition for Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5482

ALAN F. GERSMAN, *et al.*,
Appellants

v.

GROUP HEALTH ASSOCIATION, INC.

Before: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

ORDER

[Filed July 5, 1991]

Appellants' Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

A statement of Circuit Judge Wald is attached.

Wald, Circuit Judge

As expressed in my dissent to the panel opinion, I believe that the majority has over-interpreted *Patterson v. McLean Credit Union* to bar a section 1981 action by a plaintiff whose contract is terminated for discriminatory reasons and whose bid for a new contract is simultaneously rejected for the same reasons. However, because several other circuits have made similar rulings, I believe we would only add to the disarray by en bancing the case. The Supreme Court needs to revisit the scene in the interests of doctrinal coherence and fundamental equity.

FILED
DEC 23 1991
OFFICE OF THE CLERK

No. 91-724

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ALAN F. GERSMAN, *et al.*,
Petitioners,

v.

GROUP HEALTH ASSOCIATION, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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QUESTION RESTATED

Whether the termination of a commercial contract is "postformation conduct" as defined in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), and therefore not actionable under 42 U.S.C. § 1981.

STATEMENT REQUIRED BY RULE 29.1

Group Health Association, Inc. has no publicly-owned parent, subsidiaries, or affiliates.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-724

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Petitioners,

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GROUP HEALTH ASSOCIATION, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

The court of appeals held that petitioners' claim of discriminatory contract termination is not cognizable under 42 U.S.C. § 1981. Pet. App. 8a-16a. This holding is a correct and unexceptional application of the principles of *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), to the particular facts of this case. It presents no issue that is appropriate for review by this Court.

COUNTERSTATEMENT OF THE CASE

This case involves the termination of a commercial service contract between respondent Group Health Association, Inc. ("GHA") and petitioner Computer Security

International, Inc. ("CSI"). In August 1983, GHA entered into a contract with CSI for the off-site storage and retrieval of GHA's computer tapes. The initial term of the agreement was one year. Thereafter, the contract would automatically renew for successive one-month periods until either party terminated it on thirty days notice. Pet. App. 2a. CSI could adjust the fixed charges under the contract by notifying GHA forty-five days in advance of the change. *Id.* The agreement remained in effect on its original terms (except for price adjustments) until October 1987, when GHA notified CSI that it was terminating the contract.

In the latter part of 1986, Mohammad Ghafori became the operations manager of GHA's Management Operations System. CSI and its president, petitioner Alan Gersman, allege that in August 1987, Adel Nakhla, an assistant to Ghafori, asked Gersman if he was Jewish, to which Gersman answered yes.[1] After this incident, Gersman claims he began hearing rumors that GHA was dissatisfied with CSI's services. In an effort to retain GHA as a customer, Gersman offered to lower the prices in the contract, but GHA declined. On October 6, 1987, GHA terminated its contract with CSI. CSI and Gersman subsequently brought this action against GHA alleging that the contract was "cancelled and not renewed" because Gersman is Jewish, in violation of both § 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1990), and § 1-2511 of the District of Columbia Human Rights Act ("DCHRA"), D.C. Code § 1-2511 (1991).

The district court dismissed both counts of the complaint for lack of standing and failure to state a claim. Pet. App. 29a-37a. The court of appeals, while disagreeing that CSI lacked standing (Pet. App. 4a-8a), affirmed

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[1] Contrary to petitioners' suggestion (Pet. 3 n.1), GHA has denied that Gersman's heritage, race, or religion played any part in GHA's decision to terminate CSI's contract. That decision was based solely on the unsatisfactory performance of CSI.

the dismissal of the case on the grounds that Gersman and CSI failed to state a claim under § 1981 or the DCHRA. Pet. App. 8a-18a. With respect to the federal statute, the court agreed with all of the other federal circuits holding that, under *Patterson*, § 1981 does not cover contract terminations. Pet. App. 10a-13a. Applying that principle to the facts before it, the court held that GHA's actions, whether characterized as termination of or failure to renew the contract, were "postformation conduct" as defined in *Patterson*. Moreover, CSI's offer of more favorable price terms to GHA was insufficient to create a "new" contractual relationship under *Patterson*. Pet. App. 13a-15a.[2]

REASONS FOR DENYING THE WRIT

The petition presents no issue worthy of this Court's attention because there is no conflict among the circuits, the decision below was a correct and straightforward application of the law, and the passage of the Civil Rights Act of 1991 has obviated the need for this Court to "restore" protections allegedly lost under *Patterson*.

First, the lower court's decision is completely consistent with the decisions of this Court and all other courts of appeals. *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), held that § 1981's protection of the right to make and enforce contracts "does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations." *Id.* at 171. The court of appeals correctly ruled that this language bars claims based on the termination of a contract. Pet. App. 10a-13a. Every court of appeals to consider this issue has agreed. See *Taggart* v. *Jefferson County Child Support Enforcement Unit*, 935 F.2d 947, 948 (8th Cir. 1991); *Trujillo* v. *Grand Junction*

[2] Although petitioners assert that the court of appeals erred in other respects (Pet. 16-17), certiorari has not been requested on those issues (see "Question Presented"), and respondent has not addressed them herein. See Supreme Court Rule 14.1(a).

Regional Center, 928 F.2d 973, 976 (10th Cir. 1991); *Williams* v. *First Union Nat'l Bank*, 920 F.2d 232, 233-34 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2259 (1991); *Prather* v. *Dayton Power & Light Co.*, 918 F.2d 1255, 1256-58 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2889 (1991); *Thompkins* v. *Dekalb County Hosp. Auth.*, 916 F.2d 600, 601 (11th Cir. 1990) (per curiam); *Gonzalez* v. *Home Ins. Co.*, 909 F.2d 716, 722 (2d Cir. 1990); *McKnight* v. *General Motors Corp.*, 908 F.2d 104, 108-09 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1306 (1991); *Courtney* v. *Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845, 849 (9th Cir. 1990); *Lavender* v. *V & B Transmissions & Auto Repair*, 897 F.2d 805, 807-08 (5th Cir. 1990).

The lower court properly rejected petitioners' argument that *Patterson* should be limited to the employment context. Pet. App. 9a-10a. Although *Patterson* involved claims of employment discrimination, the ruling is much broader, encompassing any claim under § 1981's "make and enforce contracts" clause. That the decision was intended to apply to all types of contracts is apparent not only from this Court's reaffirmation of *Runyon* v. *McCrary*, 427 U.S. 160 (1976), a nonemployment case, but also from its emphasis on the language of § 1981. *Patterson*, 491 U.S. at 171-78. Nothing in the decision remotely suggests that the phrase "make and enforce contracts" has a different meaning depending on the type of contract under consideration. Further, *Patterson*'s discussion of the potential overlap between § 1981 and Title VII, *id.* at 180-82, was dictum; this Court neither explicitly nor implicitly endorsed the application of a different statutory standard to commercial contracts. The two courts of appeals that have addressed this issue have agreed, concluding that *Patterson* applies equally to employment and commercial contracts. See *Perry* v. *Command Performance*, 913 F.2d 99, 101 n.3 (3d Cir. 1990); *Gonzalez* v. *Home Ins. Co.*, 909 F.2d 716, 723 (2d Cir. 1990).

Second, the decision below correctly applied *Patterson* to the facts presented. After considering the automatic renewal provision of the contract, the ongoing nature of the parties' relationship, the scope of the original agreement, and the proposed modification of the price term, the court concluded that these facts together showed that GHA's actions constituted "postformation conduct" outside the scope of § 1981. Pet. App. 13a-15a. This Court has left undisturbed a host of decisions that turn on the distinction between "formation" and "postformation" conduct. See, e.g., *Hull* v. *Cuyahoga Valley Bd. of Educ.*, 926 F.2d 505 (6th Cir.), *cert. denied*, 111 S.Ct. 2917 (1991) (nonrenewal of employment contract); *Carter* v. *South Central Bell Tel.*, 912 F.2d 832 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991) (discharge); *McKnight* v. *General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1306 (1991) (recall from indefinite lay-off). Even if, as petitioners claim, *Patterson* has produced "bizarre and nonsensical results" (Pet. 8) and decisions based on "arcane distinctions" (Pet. 11), this is not such a case. The lower court's treatment of the contract issues was straightforward and unimpeachable.

Finally, this case does not raise an important question of federal law because Congress has amended the Civil Rights Act of 1866 to encompass "postformation conduct," including contract terminations. On November 21, 1991, President Bush signed into law the Civil Rights Act of 1991, Pub. L. No. 102-166, 137 Cong. Rec. H9517 (daily ed. Nov. 7, 1991). Section 101 of the Act adds to 42 U.S.C. § 1981 a new subsection (b), which states:

> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

This amendment negates petitioners' chief argument that "review by this Court is necessary to provide guidance to the lower courts and *to restore the protections of § 1981 to commercial and service agreements.*" Pet. 5 (emphasis added). Because § 1981 now explicitly prohibits racially-biased contract terminations, the issue raised in the petition is no longer a live one.

This Court has denied certiorari where, even despite the existence of a conflict, amendment or expiration of the relevant statute eliminated the problem presented by the lower court decision. See Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465, 466-68 (1953) (discussing *United States* v. *Abrams*, 344 U.S. 855 (1952); *Community Serv., Inc.* v. *United States*, 342 U.S. 932 (1952); *Sokol Bros. Co.* v. *Commissioner*, 340 U.S. 952 (1951); and *United States* v. *Beal*, 340 U.S. 852 (1950)). Denial of the petition is even more compelling here because no conflict exists in the lower courts.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

No. 91-724

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IN THE

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OCTOBER TERM, 1991

ALAN F. GERSMAN, *et al.*,
Petitioners,

v.

GROUP HEALTH ASSOCIATION, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONERS' REPLY

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IN THE

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONERS' REPLY

ARGUMENT

In its brief in opposition, Group Health Association, Inc. ("GHA") argues that a grant of certiorari is not warranted in this case because the decision below is consistent with those of other circuits and that in passing the Civil Rights Act of 1991, Pub. L. No. 102-166 (1991), Congress has provided the guidance petitioners sought from this Court. GHA misperceives the import of the Civil Rights Act of 1991, however, for this case cannot be resolved without consideration of the effect of that Act. For this reason, the Court must grant the petition for certiorari.

1. Petitioners argued that the lower courts have misapplied this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), both by extending it outside the context of employment at will and by reading

Patterson to leave racially motivated contract terminations outside the scope of 42 U.S.C. § 1981. In its passage of the Civil Rights Act, Congress resolved these issues.

Specifically, in Section 101 of the Act, subsection (2), Congress provided:

> For purposes of [42 U.S.C. § 1981], the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Under the amended definition, petitioners undeniably (and concededly, *see* Op. Cert. at 6) have stated a claim. That is, they have claimed that GHA terminated and refused to renew their contract because of racial prejudice. *See* Pet. App. 13a.

Contrary to GHA's opposition, the passage of the Civil Rights Act does not counsel against granting this petition. Rather, this Court's practice is to grant petitions where intervening legislative enactments bear on the issues presented. *See, e.g., Weinberger v. Ramirez de Arreland*, 471 U.S. 1113 (1985) (granting, vacating and remanding *en banc* opinion of the District of Columbia Circuit for consideration of the Foreign Assistance and Related Programs Appropriations Act, Pub. L. No. 98-473 (1985)); *Immigration and Naturalization Service v. National Center for Immigrants' Rights*, 481 U.S. 1009 (1987) (granting, vacating and remanding decision of the Ninth Circuit for consideration of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 (1986)); *Union Gas Co. v. Pennsylvania*, 479 U.S. 1025 (1987) (granting, vacating and remanding opinion of the Third Circuit for consideration of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 (1986)). This case cannot be resolved without consideration of the impact of the Civil Rights Act of 1991. Accordingly, this Court must grant the petition to allow for that consideration.

2. Since the enactment of the Civil Rights Act on November 21, 1991, there has been considerable litigation in the lower courts concerning the Act's applicability to pending cases. *See e.g. Stender v. Lucky Stores*, No. C-88-1467 (N.D. Cal. Dec. 19, 1991) (applying § 102 of the Act to a pending private sector case); *Mojica v. Gannett Co., Inc.* No. 90-C3827 (N.D. Ill. November 27, 1991) (same); *Van Meter v. Barr*, No. 91-0027 (D.D.C. December 18, 1991) (refusing to apply § 102(b) and (c) of the Act in a federal sector case and noting the presence of 322 cases invoking the Civil Rights Act of 1964 pending in the district). Thus this case, like thousands of others pending in the lower courts, now includes an issue concerning the applicability of the 1991 Act.

While this Court's customary practice in cases involving intervening legislative enactments is to grant, vacate and remand, this case presents an ideal vehicle for resolving the issue of the applicability of the 1991 Act to pending civil rights cases. Thus, petitioners request that the Court grant certiorari here to decide the specific question of whether the amendments made by the Civil Rights Act of 1991, and in particular Section 101 of the Act, apply to cases pending upon its enactment.

It would seem certain that this question will ultimately reach this Court. The district courts that have considered the issue have already reached different conclusions and have employed differing rationales in doing so. Given the current state of flux in this Court's teachings on retroactivity of legislation, *see Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 110 S.Ct. 1570, 1577 (1990) (noting "apparent tension" between the presumption of retroactivity in *Bradley v. Richmond School Board*, 416 U.S. 696, 712 (1974), and the presumption of prospectivity in *Georgetown University Hospital v. Bowen*, 488 U.S. 204, 208 (1988)), the circuits will likely diverge on this issue as well.

An enormous judicial economy could be captured by addressing the question that is squarely before the Court

here. As noted above, there are literally thousands of civil rights cases pending throughout the country that require a definitive resolution of this question. Until this Court resolves the issue, it will continue to be litigated in the lower courts, only later to be superseded by this Court's ultimate decision. This would waste not only scarce judicial resources, but millions of taxpayers' and litigants' dollars as well.

Indeed, this petition arises on the Court's calendar at a particularly opportune time. Were this Court to grant the petition to address this issue, briefing and argument could be completed this Term. Obviously, the sooner this Court can reach the issue, the greater the judicial economy. This Court should not let pass the unique opportunity to resolve this issue of substantial public importance.

3. As Justice White recognized in his dissent in *Bonjorno*, the presumption of retroactivity varies depending on the type of statute involved. *Bonjorno*, 110 S.Ct. 1593-94. *See also id.*, at 1579 n.1, (Scalia, J., dissenting) (distinguishing between penal and nonpenal legislation). Thus *Bowen*'s suggestion that there is an overall presumption of nonretroactivity to legislation, 109 S.Ct. at 471, is painted with too broad a brush. Rather, some legislation must be presumed retroactive, and some not.

Certainly when Congress acts to reject Supreme Court authority and thus return the law to its previous posture, its legislation must be presumed to apply retroactively. *See e.g. Ayers v. Allain*, 893 F.2d 732, 755, *vacated on other grounds*, 914 F.2d 676 (5th Cir. 1990), *cert. granted*, 111 S.Ct. 1579 (1991) (applying retroactively the provision of the Civil Rights Restoration Act of 1987 that overruled *Grove City College v. Bell*, 465 U.S. 555 (1984)). *See also Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir. 1987) (applying to a pending case Congress' enactment reversing *Smith v. Robinson*, 468 U.S. 992 (1984)). Indeed, it would be to impute a bizarre motive to Congress to presume that in renouncing an opinion of

this Court and returning the law to its intended state Congress meant to allow the erroneous construction to stand for any period.

In renouncing *Patterson*, Congress performed a constitutional function that it shares with this Court. Had this Court, rather than Congress, reversed *Patterson*, the presumption would have been that that reversal would apply retroactively. *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439, 2443 (1990); *United States v. Security Industrial Park*, 459 U.S. 70, 79 (1982). There is no reason to presume that Congress, in performing this co-equal function, would have intended its corrective power to run more narrowly than the judiciary's. On the contrary, if the theory behind retroactive application of judicial decisions is that the court is simply declaring what the law has always meant, *see American Trucking Ass'ns v. Smith*, 110 S.Ct. 2323, 2343 (1990) (Scalia, J. concurring), the same must hold true when Congress corrects Supreme Court constructions that deviate from the legislature's original intent.

Finally, whatever the presumption of retroactivity may be, that presumption must yield if application of the statute would work manifest injustice. *Bradley*, 416 U.S. at 711. Here, it would be manifestly unjust to relieve GHA of liability for conduct that was unlawful at the time of its occurrence. By non-retroactive application of the Civil Rights Act of 1991, GHA would escape liability through the brief window between *Patterson*'s rejection of the longstanding interpretation of 42 U.S.C. § 1981, and Congress' rejection of *Patterson*. And it would do so at the expense of petitioner's congressionally reaffirmed right to be free of racial discrimination.

There is of course, far more to be said on the issue of the applicability of the Civil Rights Act of 1991 to pending cases. Petitioners request that the Court grant plenary review to allow for the presentation of these arguments.

CONCLUSION

For the foregoing reasons, and for those reasons set forth in our petition, the petition for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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